Supreme Court, U.S.
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No. 98-351

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

BURLE B. BEARD,

Petitioners,

v.

DAN BAUM, HAROLD CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, CAROLINE VENUSTI, and the STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE M. BOTELHO
ATTORNEY GENERAL
By: Susan D. Cox
Assistant Attorney General
Department of Law
PO Box 110300
Juneau, Alaska 99811
(907) 465-3600

COUNSEL FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioner properly raise his federal question--whether his 42 U.S.C. § 1983 claim may be subject to a defense of failure to exhaust administrative procedures--in the state court?

2. Does the Alaska Supreme Court decision, holding that petitioner waived any argument that his § 1983 claim could not be dismissed for failure to exhaust administrative remedies by failing to timely raise it, conflict with relevant decisions of this court?

LIST OF PARTIES

Of the Respondents listed in the caption of the petition, only William McMullen and Caroline Venusti are parties subject to the petition for writ of certiorari. Baum received a favorable jury verdict, and was not involved after the trial. Special Verdict; Appendix 40-43. The jury verdicts against Cameron and McLeod were vacated by the Alaska Supreme Court as not supported by the evidence. *Cameron v. Beard*, 864 P.2d 538, 549-550 (Alaska 1993) (*Beard II*). The State of Alaska is not the proper subject of a 42 U.S.C. § 1983 claim. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Burle Beard's petition arises out of a state court action filed in 1987, complaining of work-place frictions dating from 1985. *Beard v. Baum*, 796 P.2d 1344, 1347 (Alaska 1990) (*Beard I*). A second appeal was decided in 1993. *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993) (*Beard II*). An opinion in a third appeal was published in 1997. *State v. Beard*, 948 P.2d 1376 (Alaska 1997) (*Beard III*). The *Beard III* opinion was then modified upon rehearing in 1998. *State v. Beard*, 960 P.2d 1 (Alaska 1998) (*Beard IV*). Beard's petition for writ of certiorari fails to assert that he at any time raised his federal issue--that his 42 U.S.C. § 1983 claims could not be dismissed for failure to exhaust state administrative remedies--before the state trial court. His petition acknowledges he did not raise the issue during *Beard II* at all, nor in the third Alaska Supreme Court appeal until he filed a petition for rehearing. The ruling by the Alaska Supreme Court in *Beard IV* that Beard waived his federal constitutional argument does not conflict with relevant decisions of the United States Supreme Court.

STATEMENT OF CASE

The facts set out by Beard in his petition are disputed. Beard was not a State of Alaska Department of Transportation (DOT) employee who, as a union representative, discovered routine misuses of state time and property and felt compelled to report them. Petition for Writ of Certiorari at 3. Beard's 1985 diary entries, admitted into evidence at trial, reveal he was already a disgruntled and hostile DOT employee before becoming a union representative and before he claims he discovered misuse of state resources:

> February 12, 1985: Told Harold, my boss, I want the job of Negotiator which will be opening soon....Think I shocked him cause he believes I don't care about it + the way he's passed me over before. . . .
>
> February 25, 1985: . . . Depressing day at work; saw a memo from the boss, Harold, to Juneau, requesting all sorts of changes in higher "grades" (promotions) to apparently by-pass me again. I'm getting paranoid, or at last seeing the truth. I'll find out in a few weeks or months.
>
> March 21, 1985: Went to see APEA (St Empl. Union) to see where I stand in regards to Harolds recent,

+ long passed actions regarding the job. (my boss). . . .
March 23, 1985: Warm today. Got up about 3 am w/ neck hurting a bit + thinking on my gripe against the boss. . . .

March 25, 1985: Went to breakfast then returned home where I continued writing an update on my job experience in hope of getting an upcoming promotion.

March 26, 1985: . . . APEA will type all the info up + attempt to get me a promotion, my first in 9 yrs, 7 mos. . . .

April 3, 1985: Interviewed for Pam's R/W III . . .Harold had to interview me for the III he wants Pam to get. Will see she gets it regardless, but I don't know why; what has she got on him? Will let it go + file a grievance. . . .

April 5, 1985: . . . Got a copy of my updated appl'n to Harold but he took off this afternoon so hasn't seen it nor a memo I wrote requesting a negotiating assignment. He'll shit Monday. . . .

April 8, 1985: . . . Waited for some reaction to my memo to Harold, along w/ my updated appl'n + a letter from APEA saying how well qualified I am. Nothing! However, I heard him say to Sharon, my (in theory) boss: "no place in negotiations, so try to think of

> something." Think Chuck (at office) was right: Harold doesn't want anyone in R/W to tell public about his overly high-paid position. We'll see how it goes. If he gives me a III, I'll still file a grievance for past + present discrimination against most of us. . . .
>
> April 10, 1985: . . .Went to lunch w/ Bruce + Chuck + discussed my problems w/ Harold. Think he think's he's in trouble. Sure hope so. . . . His ass to be reamed, if possible. Attended my first Alaska Public Employees Assoc. meeting as a "Building Representative" after work. Interesting. May help my problem w/ Harold.

Excerpts of Trial Exhibit AA, Appendix 3-12.

Respondents also dispute the contention in Beard's petition for writ of certiorari, that any individual supervisors or co-workers initiated a campaign of criticism, poor performance evaluations, false accusations, or any other conduct intending to develop a pretext for firing Beard. Petition for Writ of Certiorari at 4. Although a jury conclusion found for Beard against four named individual co-workers, the Alaska Supreme Court vacated two of those verdicts as unsupported by any cognizable evidence. *Beard II*, 864 P.2d at

549-550.[1] The respondents maintain that they were legitimately trying to deal with any unproductive employee who spread dissension, did not perform his duties, abused state resources (secretarial personnel and official work hours) in his own campaign, and lied about his use of state time and personnel when confronted. *Beard II*, 864 P.2d at 541.

Beard was employed by the Alaska DOT and did become a union building representative in April, 1985. *Beard I*, 796 P.2d at 1347. He then reported to a number of state and federal agencies a collection of what he called abuses of state time and equipment. *Beard II*, 864 P.2d at 540. He complained that a state employee was going to his personal mail box during working hours, while driving a state vehicle, that an employee was charging eight hours of work per day but only working seven and one-half hours each day, and that an

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[1]An argument not reached by the Alaska Supreme Court in *Beard IV* was that, given the showing that the jury had entered verdicts without any supporting evidence against some defendants, the jury deliberations were obviously flawed and a new trial should be ordered for the remaining defendants. Excerpt of Response to Petition for Rehearing to *Beard III*, Appendix 44-55; *Beard IV*, 960 P.2d at 2.

employee cut a boss's lawn during working hours. Trial Exhibit J, Appendix 13-28. An internal investigation of the complaints was conducted by the DOT Internal Review Section. *Beard II*, 864 P.2d at 541. The internal review substantiated only two of Beard's twenty-one allegations of wrong-doing, and prescribed corrective measures. *Beard II*, 864 P.2d at 541; Tr. Ex. J, Appendix 14.

Beard was dissatisfied with the internal review, demanded an investigation from outside the agency, and "went public" with his allegations of fraud. *Beard II*, 864 P.2d at 541. He ultimately retired in 1986, then filed suit against William McMullen, the DOT director, alleging the torts of misrepresentation, defamation, and Intentional Infliction of Emotional Distress (IIED). *Id.* at 542.

A motion to dismiss the IIED claim was granted after it was not opposed. *Id.* A tardy opposition was filed after the dismissal order was entered, and included an affidavit from Beard's union representative, Bruce Senkow. *Id.* The affidavit was used by Beard to represent that the union would not file Beard's grievance at the time of his

termination. *Beard I*, 796 P.2d at 1349. The dismissal order was not reconsidered, and the defense had no opportunity to review or challenge the Senkow affidavit. *Beard II*, 864 P.2d at 545.

The suit was expanded to add tort claims against five additional individual state employees and a constructive discharge claim against Beard's former employer, the State of Alaska. *Beard I*, 796 P.2d at 1344, 1348. Beard set out nine causes of action, all of which were dismissed or decided on summary judgment in favor of the defendants. *Beard I*, 796 P.2d at 1348.

Beard appealed all issues, and asserted in his opening brief on appeal in two sentences that under 42 U.S.C. § 1983 he had a claim for violation of his free speech rights. Petitioner's Appendix 164. The respondents argued in their 1989 appellee's brief that the state and its employees in their official capacity were not subject to suit under *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). They also asserted, pursuant to *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, 1968), that not all

employee speech was protected speech, and that the trial court had determined that the speech was not protected. Excerpt of Brief of Appellee to *Beard I*, Appendix 29-34.

Beard abandoned the constitutional claims in his Reply Brief in *Beard I*. His summary of request for relief was limited to a remand of the defamation, IIED, and constructive discharge claims:

> For these reasons the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional infliction of emotional distress, wrongful constructive termination and defamation.

Excerpt of Beard's Reply Brief to *Beard I*, Appendix 35-39.

In 1991 the Alaska Supreme Court found that the tardy, un-examined affidavit by Senkow defeated the state's grant of dismissal as to the constructive discharge and IIED claims. *Beard I*, 796 P.2d at 1349. The court also revived Beard's claim for violation of 42 U.S.C. § 1983, holding that if he were constructively discharged for exercising his free speech rights he had stated a viable claim. *Beard I*, 796 P.2d at 1351. The court noted that his 42 U.S.C. § 1983 claim was

dependent on the resolution of his constructive discharge claim. *Beard I*, 796 P.2d at 1352, n.8. The complaint as to constructive discharge against the state employer was reinstated, as well as the claims for IIED and free speech violation against the individual defendants. *Beard I*, 796 P.2d at 1349, 1353. Beard did not seek, on rehearing of *Beard I*, a ruling that his free speech claims were not tied to the constructive discharge claim.

Upon remand the defendants obtained evidence from Senkow's deposition that the Senkow affidavit had been improperly used, that Beard's complaints of harassment did not relate to the time of his termination, but only related to the union's refusal to grieve job assignments in his job description. *Beard II*, 864 P.2d at 543, n.3; *Beard IV*, 960 P.2d at 3-5. The affidavit's reference to claims of harassment did not relate to the time Beard retired from state employment. *Beard IV*, 960 P.2d at 3.

At the state trial court the defendants renewed their motions for summary judgment. The motions were denied by the trial court because, as the Alaska Supreme later explained

it, the trial court "erroneously interpreted our decision in *Beard I* as conclusively deciding the exhaustion issue." *Beard II*, 864 P.2d at 545. A trial resulted in a jury interrogatory which found constructive discharge against the state government as the employer, IIED damages against three named individual defendants, punitive damages against four individual defendarts, and no damages for the violation of free speech rights. *Beard II*, 864 P.2d at 544. A jury comment added to the verdict form that money could not compensate Beard for loss of any free speech.[2] *Id.* A new appeal, *Beard II*, was then taken.

Although the defendants in *Beard II* argued that they had unfairly been denied the right to press their exhaustion of available administrative remedies defense, Beard did not argue in that appeal, as an alternative reason to support his free speech verdict, that the

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[2]The jury verdict as to the free speech claim is problematic for Beard. Should the petition for writ of certiorari be granted and Beard to prevail in his arguments, his remedy would then be to reinstate the zero verdict.

exhaustion defense did not apply to his free speech claims.[3] *Beard IV*, 960 P.2d at 8.

In 1993 the Alaska Supreme Court vacated the verdicts against two of the named individuals, holding that the verdicts were unsupported by any evidence. *Beard II*, 864 P.2d at 549-550. The court held that the trial court had misunderstood the effect of *Beard I*. The court explained that *Beard I* presented Beard's appeal of summary judgment for the defense, but that at no time had Beard sought summary judgment to foreclose the affirmative defenses. *Beard II*, 864 P.2d at 545. The effect of *Beard I* was merely to reinstate the case for litigation; the affirmative defenses were viable defenses after remand, which the defendants were entitled to pursue and prove. Because the trial court had not allowed the respondents to present evidence on the exhaustion of administrative remedies, the Supreme Court remanded the case for an evidentiary hearing on that issue. *Beard II*, 864 P.2d at 545. Again, Beard did not seek rehearing by the Alaska Supreme Court of *Beard*

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[3] Perhaps because the verdict awarded no money damages Beard in 1993 did not press the argument he makes in the present petition.

II, nor argue that the free speech claim was not tied to the resolution of the constructive discharge issue or that it could not be subject to an exhaustion defense.[4]

After the remand Senkow testified that there was no impediment to Beard filing a grievance under the union agreement at the time of his retirement.[5] *Beard IV*, 960 P.2d at 3-5. The trial court ruled that the union *should have* filed a grievance without Beard's

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[4]Subsequent to the Alaska Supreme Court's decision in *Beard II* the ability of the government as an employer to control employee speech was discussed in *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). In *Waters* the Court held that the government as an employer had more discretion to control speech disruptive of the workplace than to control the speech of the citizenry in general. In the case of speech on a matter of public concern, the potential disruptiveness of the speech by an employee may outweigh whatever First Amendment value the speech may have, so that a violation may not be compensable. *Waters*, 511 U.S. at 680-681, 114 S.Ct. at 1890.

[5]The only evidence of the union's attitude about filing a grievance for constructive discharge is that presented through Senkow, and Beard's girl friend, Evie Seymore. *Beard IV*, 960 P.2d 4. Beard has never by testimony or affidavit challenged Senkow's testimony.

request and, without any testimony on the matter, found the grievance process inadequate. *Beard IV*, 960 P.2d at 4-5. The state and the two remaining individual defendants, William McMullen and Caroline Venusti, appealed the trial court's ruling after the remand of *Beard II*. *Beard IV*, 960 P.2d at 5. Although Beard filed a brief in opposition to the defense appeal, he did not argue in his *Beard III* brief that his free speech claim was independent of the constructive discharge claims or that an exhaustion defense could not bar his free speech claim. *Beard IV*, 960 P.2d at 9.

In *Beard III* and *Beard IV* the Alaska Supreme Court held that the trial court's decision was without factual basis and was also contrary to controlling legal principles. *Beard IV*, 960 P.2d at 6-8. After receiving the opinion in *Beard III*,[6] Beard petitioned the Alaska Supreme Court for rehearing, reciting that the court had committed plain error by

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[6]*Beard III* was first published at *State v. Beard*, 948 P.2. 1376 (Alaska 1997). That opinion has been superseded, with modification to the opinion reflected at *Beard IV*, 960 P.2d at 8-9. May 29, 1998 Clerk's Order on Petition for Rehearing, Appendix 63-64.

not *sua sponte* deciding the appeal with recourse to *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). Excerpt of Beard's Petition for Rehearing, Appendix 54-62. He acknowledged that he had not raised the argument in any of the *Beard II* pleadings or the appeal briefing for *Beard III*. Appendix 55 n. 8.

The defense responded to Beard's petition for rehearing by noting that Beard actually waived his 42 U.S.C. § 1983 claim in his Reply Brief in *Beard I* in 1989, failed to list the argument as an alternative ground to uphold his favorable verdict in *Beard II* in 1994, and failed to list the argument as a point on appeal in 1997 in *Beard III*. The Alaska Supreme Court denied Beard's petition for rehearing on the ground that Beard had waived the argument by not timely raising it. *Beard IV*, 960 P.2d at 9. The court modified its initial *Beard III* opinion to clarify that its decision was based on Beard's failure to raise the issue, and was not a ruling inconsistent with *Patsy*. *Id.*

> Beard's petition for rehearing, filed after we issued our original opinion in *Beard III*, raises an argument he did not previously raise

> in *Beard I*, *Beard II*, or *Beard III*: that his claims against Venusti and McMullen are based at least in part on 42 U.S.C. sec. 1983, and to that extent are not subject to the exhaustion doctrine. He claims that his IIED claims were based on sec. 1983. In support, Beard cites *Patsy v. Board of Regents*, 457 U.S. 496 (1982), and *Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991).
>
> Beard failed to assert a timely argument distinguishing between sec. 1983 claims and non-sec. 1983 claims in opposing Venusti's and McMullen's fundamental defense, failure to exhaust, which has been the subject of three appeals and three appellate opinions. He also failed to raise a timely distinction between claims against the State and claims against Venusti and McMullen. Beard has consequently waived the argument that the exhaustion doctrine cannot bar his claims against Venusti and McMullen.

Beard IV, 960 P.2d at 9.

From the denial of the petition for rehearing, Beard seeks review by the United States Supreme Court.

REASONS FOR DENYING THE WRIT

In order to justify review by the Court in this case, Beard must demonstrate that the Alaska Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). Beard attempts to meet this threshold by claiming that the Alaska Supreme Court has held that failure to exhaust state administrative procedures is a defense to a 42 U.S.C. § 1983 claim. However, the court has not in fact made such a holding. In *Beard IV*, the Alaska Supreme Court determined only that Beard had waived the argument that exhaustion could not be a defense to a § 1983 claim. *Beard IV*, 960 P.2d at 9. The Alaska Supreme Court expressly declined to reach the merits of Beard's argument on rehearing, because it found the issue was not raised in a timely manner. Therefore, the Alaska Supreme Court's holding does not conflict with *Patsy v. Board of Regents*, 457 U.S. 496 (1982), or any other decisions of this Court. There is no reason for the Court to grant Beard's petition.

I. BEARD HAS NOT ESTABLISHED THAT HE RAISED THE EXHAUSTION ISSUE IN THE CONTEST OF HIS § 1983 CLAIM IN STATE COURT

As an initial requirement, a petition for writ of certiorari must include a statement setting out when the petitioner raised the federal question in the state trial and appellate courts. Supreme Court Rule 14.1(g)(i). Not only has Beard failed to show he timely raised his federal question in the highest Alaska state appeals court, he has failed to show that he ever raised the issue with the state trial court. His two sentence reference to the argument in his brief in *Beard I* contains no record citations to having raised the issue with the lower court. Petitioner's Appendix 164. Beard's present petition for writ of certiorari is fatally defective because he did not raise the issue or develop his argument at the state trial level.

Beard claims he preserved his issue in 1989 with two sentences in his brief of Appellant in *Beard I*. Petitioner's Appendix 164. However, he then abandoned the issue in his reply brief in *Beard I*. Appendix 35-39. Even without the abandonment in his reply

brief, two sentences filed two appeals and nine years earlier could not and did not properly raise the issue for consideration by the Alaska Supreme Court in *Beard III*. The issue was not raised in the initial briefing in *Beard III*, and was only placed before the Alaska Supreme Court on rehearing.

In *Adams v. Robertson*, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed. 2d 203 (1997), this Court refused to review an Alabama decision, after initially granting certiorari, when it became apparent that the federal question at issue had only been superficially treated in the appellant's opening brief before the Alabama Supreme Court. *Id.* at 1030. The Court stated its rule in reviewing State Court judgments that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision" to be reviwed, with only "very rare exceptions." *Id.* at 1029. The Court declined to decide whether the requirement that the federal question be properly presented in the state court defeated jurisdiction, or whether the defect compelled dismissal as a simple matter of judicial prudence. *Id.* at 1031. In

dismissing the *Adams* writ the Court noted that the states' highest courts have an understandable interest in resolving constitutional issues, and that the failure to properly raise the issue handicaps the United States Supreme Court by not having a proper record and not giving the parties an opportunity to refine their positions before reaching the Court. *Id.* at 1031. The petitioner in *Adams* apparently sought to excuse the superficial briefing in the state court appellate brief by showing that the issue was also presented in a petition for rehearing before the Alabama Supreme Court. *Id.* at 1031, n.3. The United States Supreme Court was not persuaded by the petitioner in *Adams*, specifically instructing that the court generally refuses to consider issues first clearly raised in a petition for rehearing. *Id.* at 1031, n.3.

Beard is on even weaker ground than the petitioner in *Adams*. Beard did not raise his federal question at all in *Beard III* until he petitioned for rehearing. *Beard IV*, 960 P.2d at 9. For that reason alone, under *Adams*, no writ of certiorari should issue. Moreover, even considering the totality of the state

court appellate proceedings in this case, there is no basis for granting a writ. Beard failed to adequately or timely put the § 1983 issue before the Alaska Supreme Court. He addressed the federal question in *Beard I* in a mere two sentences in 1989, then abandoned the argument in his reply brief, did not raise the issue at all in 1993 in *Beard II*, and only raised the issue in *Beard III* in 1997 in a petition for rehearing. This treatment of the issue at the state court level defeats his claim that this Court should grant review. *Adams* disposes of Beard's argument that a "failure to brief" rule should not prevent the issuance of a writ of certiorari. *Id.* at 1029-1031.

II. THE ALASKA SUPREME COURT HAS NOT DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

A discretionary writ of certiorari is reserved for resolution of only the most significant federal questions. In this case Beard must show that the decision of Alaska's highest court on a federal question conflicts with relevant decisions of the United States Supreme Court. Supreme Court Rule 10(c). This he cannot do. The Alaska Supreme Court has not

entered any decision with precedential force which conflicts with controlling decisions of this Court. The Alaska Supreme Court's decision in *Beard IV* merely declined to address an argument raised for the first time in nine years, on rehearing of the third appellate decision in this case.[7] Beard asked the Alaska Supreme Court to conclude on rehearing of *Beard III* that it committed "plain error" under the Alaska rules by failing to *sua sponte* raise the issue of the interplay between the exhaustion of administrative remedies and the exercise of free speech by government employees, in a context where the employee was not fired, but only claimed after retiring to have been "constructively discharged." The Alaska Supreme Court declined to conclude it had committed plain error by failing to anticipate this new argument or open the door for more briefing on issues which had not been considered by the lower trial court. Instead, the court found that Beard had waived the argument he now presents to this Court, and

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[7]Nine years earlier the argument was given such cursory treatment it was inadequately briefed. Petitioner's Appendix 164.

declined to reach the merits of that issue. Consequently, *Beard IV* does not decide the question of whether a § 1983 claim can be barred for failure to exhaust state administrative remedies, nor decide any federal question, in a way contrary to relevant decisions of this Court.[8]

CONCLUSION

The petition should not be granted because the state court decision at issue, *Beard IV*, does not conflict with a relevant decision of the United States Supreme Court. The federal question was not raised in the state trial court, and was not properly presented for consideration by the Alaska Supreme Court.

Respectfully submitted this 28th day of September 1998.

Bruce M. Botelho
Attorney General

Susan D. Cox
Assistant Attorney General

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[8]The Alaska Supreme Court's refusal to consider the merits of the issue once belatedly raised is in fact consistent with this Court's approach. *See Adams*, 117 S.Ct. at 1029-1030.

APPENDIX

No. 98-351

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Petitioners,

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DAN BAUM, HAROLD CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN c. SISK, CAROLINE VENUSTI, and the STATE OF ALASKA,

Respondents.

On Petition For Writ Of Certiorari To The Alaska Supreme Court

AFFIDAVIT OF LISA TAYLOR

Exhibit No. AA (case no. 4FA-87-369 CI) was typed from hand-written notes. The spelling of certain words were typed as seen or to the best of my knowledge.

Dated this 23rd day of September 1998 at Juneau, Alaska.

/s/
Lisa M. Taylor, Legal Secretary
Department of Law, State of Alaska

SUBSCRIBED AND SWORN TO before me this 23rd day of September 1998.

/s/
Pamla Credo-Hayes
Notary Public for Alaska
My commission expires: 2000

TRIAL EXHIBIT AA

EXCERPT FROM BEARD'S 1985 DIARY ENTRIES

Tuesday, February 12, 1985

Told Harold I want a promotion. Told Harold, my boss, I want the job of negotiator which will be opening soon. I'm the only one on the St. Register for R/W Agent 18 in the Fbx area that I know of; the only one qualified in other words. Think I shocked him cause he believes I don't care about it & the way he's passed me over before. One of the fellow workers needed a lift to Sandwick St. after work so went to video tape rental outfit first to buy a punch card of tape rentals for Patty's birthday. Took Deano to his pickup then home. Brot in wood, reloaded the bird feeder w/more sunflower seeds & loafed awhile. Laurie called about 7 PM & we went down for Patty's birthday party. She got a sweater & socks from Evie.

Wednesday, February 13, 1985

Ice foggy today. Remained cold all day the by 4:30 P the temp was about -8°.

Shopped a bit then home. Didn't do much this evening. New renter came over & asked if my

garage was warm -- his cold-running car is getting colder. Told him I would help him tomorrow evening to put in his new thermostat. Too dark presently.

Sunday, February 24, 1985

Went to breakfast at the Fbx Bakery then back to get in wood, shovel some snow & break some ice from the laundry room roof. Later, while Evie napped, I worked on cabin records & my cking acct. Changed doggy papers, brot in ice chunks to melt for water & read the Sun. paper.

Ironed pants & shirts for Carlos(?) to wear at work. Tried on older pants & shirts to see if they fit; if not I set them out for Salvat. Army. Good clothes too.

Monday, February 25, 1985

Took the pkup to work & afterwards dumped the trash & home to shovel the snow from the pkup bed.

Brot in a load (use wheelbarrow from firewood stack by shed to house) of firewood, then a bucket of ice (from the laundry room roof

clearing Sun.). Fed the pups, all five, & the cats, cat & kitten.

Daylite upon leaving the hse for work this morning at 7:30 AM. Daylite lasting til about 7:30 PM.

Depressing day at work; saw a memo from the boss, Harold, to Juneau requesting all sorts of changes in higher "grades" (promotions) to apparently by-pass me again. I'm getting paranoid, or at last seeing the truth. I'll find out in a few weeks or months.

Thursday, March 21, 1985

Went to see APEA (St. Empl. Union) to see where I stand in regards to Harolds recent & long passed actions regarding the job. (My loss).

Fellow there says he thinks I have suff. grounds to file a grievance. I'll see him again tomorrow w/more documentation & info.

Friday, March 22, 1985

Very warm & bright. Quit work at 2:30 P.M. & visited APEA office.

Cheech & Chong
Bland Mellon Chitten
I can still get it up; I just can't get it in.

Saturday, March 23, 1985

Warm today. Got up about 3 AM w/neck hurting a bit & thinking on my gripe against the boss. Came downstairs for 1 ½ hrs or so then to bed. This morning about 7:30 AM my neck was just killing me. Don't know if it's part of slamming my head on the ice last Sat. nite or no. Went to town for breakfast, shopped, went to ck. on the airplane then waited Trix & Patty. Picked up a neighbors (asshole) dog & took it to the pound. Came home & tried napping.! No go. Evie pulled up the carpet & prepared the subfloor for gluing down T&G wood strips as new surface. I wrote an update of my job Appl. w/the State, which I'll let the fellow at APEA (Union) see before I type it & send it in. Quit about 7 PM & made a beer run to College. Evie went with Trix to watch Patty play volleyball at West Valley.

Sunday, March 24, 1985

Up very early-sore neck. Read awhile then began writing on my job application update.

Wrote most all day but took a break for a run to town for a new, fine point saw with which Evie could cut the wood strips she's gluing to the living area floor. Finally gave up about 6 PM. Read the paper & loafed.

"Doc said if I don't quit drinking I'd lose my hearing. I told him what I was drinking was a lot better than what I was hearing."

Monday, March 25, 1985

Holiday. Went to breakfast then returned home where I continued writing an update on my job experience in hope of getting an upcoming promotion.

A fellow found an envelop w/$24 & 3 soy beans inside while looking thru his wifes dresser. He asked about it & she said she had been unfaithful & each time she earned a soybean. He said he too had been unfaithful a couple of times but they should forgive and forget. She agreed. He asked what the $24 was for. She said that when soy-beans hit $8/bushel, she sold!

Tuesday, March 26, 1985

Renter left-refunded damage & unused rent. Had a bunch for Glen Potts, fellow who came into appraisal about 2+ yrs. ago. He's leaving to join Walt & fee-appraise. After work I took a copy of an appraisal I did several years ago, "Nome Seawall," along with copies of all the certif's I've accumulated over the years at classes, courses & seminars, all dealing w/DOT&PF. R/W (right of way). Took along copies of parcel plats I've drawn as a draftsman-which I've been doing now for 15 months. APEA will type all the info up & attempt to get me a promotion, my first in 9 yrs, 7 mos. Brot in wood, inspected cabin No. 1 w/renter & refunded hes some money then loafed.

Wednesday, April 3, 1985

Interviewed for Pams R/W III. Harold had to interview me for the III he wants Pam to get. Will see she gets it regardless, but don't know why; what has she on him? Will let it go & later file a grievance.

Gone to APEA (our Union) & signed my updated appl'n. Still some typing to do on the "attached" pages tho.

Got home after work & spent some time fitting a too-large handle into my log-splitting maul then used it. Cold!

Thursday, April 4, 1985

Picked up my completed job appl'n update from APEA, our Union & took it home to read.
Split wood, fed dogs etc.
Boro dog catchers came up later said they had complaints about my dogs. Told them of the assholes & hippocrits on the hill. Loafed.
(Con't from next page)

Peter said: "Oh, no; you didn't want to sit w/them. They're going to Hell for lying; you & I are going to Bakersfield!"

Friday, April 5, 1985

Went to lunch w/Bruce & Steavy at Safeway Mall. Got a copy of my updated appl'n to Harold but he took off this afternoon so hasn't seen it nor a memo I wrote requesting a negotiating assignment. He'll shit Monday.

Three fellows at the pearly gates. St. Peter asked the first if he'd been faithful to his wife. "Oh, no. Never even thought of another

woman." He told the fellow to sit on his left. He asked the second fellow the same: "Oh, yes. Stayed true all my life." St. Peter said "sit on my left." he asked the third fellow who said he dollied w/a gal in Bakersfield a week before he died & she was great, but now he was sorry. St. Peter told him to sit on his right. He said he'd like to sit w/the others. St. -- See April 4--

Saturday, April 6, 1985

Cool all day tho bright. Visited Laurie & Trix (told me a joke--see Fri. page) then into town to buy some base cabinets for Cabin No. 1. Got them & went towards Foodland but the truck almost gave up. The vibration damper (lower pully) came loose & the engine over heated. Couldn't fix it (left my tools home) so worked my way back by running a ways then shutting off the engine to coast or, on occassion, stopped to let it cool. Got it tightened, at least for awhile then brot some things in from the pkup. Evie called as I walked in. She needs some things so I got in the car & back to town. Spent lots, & home to spend more then try to get it on the airline

Monday before 2 PM. Packed some of it then loafed. Pooped.

Sunday, April 7, 1985

3-wheeled down to Laurie & Trix's & put some candy eastereggs here & there--cold. Loafed some this AM & cleaned up a few things.

Went back down on the sno-go about 1:30 PM & stayed the day. Returned after dinner & a movie, about 10 PM.

Monday, April 8, 1985

Let up a little now & then, but for the most part, it snowed all day. Still at it this evening at 8 PM.

Waited for some reaction to my memo to Harold, along w/my updated appl'n & a letter from APEA saying how well qualified I am. Nothing! However, I overheard him say to Sharon, my (in theory) boss, "no place in negotiations, so try to think of something." Think Chuck (at office) was right: Harold doesn't want anyone in R/W to tell public about his overly high-paid position. We'll see how it goes. If he gives me a III, I'll still file

grievance for past & present discrimination against most of us.

Bot an 18" wide base cab. tonite & assembled one of the 30" base cab. I bot Sat.

Wednesday, April 10, 1985

Went to lunch w/Bruce & Chuck & discussed my problems w/Harold. Think he thinks he's in trouble. Sure hope so. Steavy, secretary, says Harold is becoming polite to her. He never was before so think he's aware she's helping me. His ass is to be reamed, if possible. Attended my first Alaska Public Employees Assoc. meeting as a "Building Representative" after work. Interesting. May help my problem w/Harold.

Snow began this afternoon & temp. dropped a bit.

TRIAL EXHIBIT J

TO: William McMullen, Director
Design and Construction Northern Region
FILE NO: 010-1390

Thru: Glen Glenzer, Deputy Commissioner, Northern Region

FROM: Robert W. Janes, CPA /s/
Chief, Internal Review
Department of Transportation & Public Facilities
Date: August 21, 1985
Telephone no.: 465-2080

SUBJECT: Allegations of Wrongdoing in Right of Way Section Audit 85-SF-18

The Fairbanks Internal Review office has made a review of certain allegations made against several persons in the Fairbanks Right of Way (ROW) Section of the Department of Transportation and Public Facilities (DOT&PF). The allegations were brought to the attention of Internal Review through a letter from the Attorney General's office forwarding a letter they had received from the U.S. Department of Transportation, Office of the Inspector General. Mr. Burle Beard had written to them alleging that personnel in the ROW Section were abusing the use of State owned vehicles and improper use of state time.

Mr. Beard was contacted and he made certain verbal and written allegations that he gave to the reviewer. These allegations are listed in Appendix A.

There were twenty one allegations against the ROW Section, however, there are only two which are considered valid based on the additional evidence gathered during our interviews.

The allegation that Arnold Tornell used a state car on state time to pick up his personal mail is correct. Arnold Tornell stated that on numerous occasions he had picked up his personal mail at the Post Office, but only when he was downtown on state business. At this point in time, and based on our interviews, it is virtually impossible to determine whether the trips were really necessary or not. However, the fact remains that some state business was regularly conducted by Mr. Tornell downtown. Mr. Tornell is now retired from State government.

Also, an allegation was made that Dan Baum attended Borough Platting Board meetings

and charged his time to projects. This allegation is correct. Mr. Baum was allowed to attend board meetings (he was a member of the Platting Board) by his supervisor and the Chief ROW Agent because it was considered in the best interest of the State and the Department to have an employee on the Board. In our opinion, Mr. Baum did not charge his time properly as it should have been charged to overhead and no a specific project. Mr. Baum charged his meeting time to the project which he worked on prior to the meeting. Over the 10 month period up until April of 1985, Mr. Baum was on the Platting Board, meeting two Wednesdays per month at 3:00 pm. At that time, the workload in the ROW Section was such that Mr. Baum was not able to leave work for the Platting Meeting until 4:30 or 5:00 pm.

Mr. Baum's time which was charged to projects rather than overhead is as follows:

State Maintenance Projects	1.5	hrs.	$ 60.12
* Alaska Highway Mile 1270-1285	3.0	hrs.	120.24
* Delta Erosion Control	1.5	hrs.	60.12
* Alaska Highway Mile 1256-1270	6.0	hrs.	240.48

Healy-Otto Lake Access Road	1.5 hrs.	60.12
* South Fairbanks Expressway - East	7.5 hrs.	300.60
Total	21.0 hrs.	$841.68

*Indicates Federal-Aid projects.

RECOMMENDATIONS:

1. That Regional management remind employees that State vehicles are for official use only and are not to be used for personal business.

2. Management should provide an overhead project account so that time charges for CIP personnel with other administrative duties can be charged to an overhead account rather than to a project as is now done. If the Region concurs, an adjustment for the above mentioned federal-aid projects should be made. A copy of that adjustment should be forwarded to our office and we will provide a copy to the Federal Highway Administration to close our audit file.

cc: R.J. Knapp, Commissioner, DOT&PF
Bill Cummings, Assistant Attorney General
Gayle Savage, AG Criminal Investigation

CONFIDENTIAL
DEFENDANT
EXHIBIT NO. J
ADMITTED
4FA 87-369 CI

Audit 85-SF-18

Appendix A TO TRIAL EXHIBIT J

Mr. Burle Beard's allegations against members of the Right of Way staff are listed below and then are followed by a summary of this review's conclusions:

Allegations Against the Following Individuals:

A. Harold Cameron

1. He directed Walt Werner to change the value of his appraisal on Ebenal Parcel to facilitate the negotiation of the parcel.

2. He made Walt Werner change Walt's personnel evaluation of Dan Baum.

3. He signed Arnold Tornell's timesheets (many times) knowing Arnold had only worked 7 1/2 hours a day rather than the 8 hours a day as reported and approved.

4. He permitted Arnold Tornell to use a state car to pickup personal mail at the Post Office on state time.

5. He attempted to get extra pay for Dan Baum through a retro promotion.

6. He discriminated against Charles Moyer when Sharon McLeod was hired as Relocation Supervisor, he discriminated against Steevyn Cysewski when she was passed over twice when two persons from outside the Department were hired, and he discriminated against Burle Beard by not promoting him in 9 1/2 years and not providing cross training so that he could become eligible for a promotion.

7. He refused appraisal training for Walt Werner and Glen Potts.

8. He signed Pam Lewis's Position Description Questionnaire (PDQ) knowing that the information contained on the PDQ was not true.

9. He put pressure on Rich Kendall to do a "hatchet job" on John Evans so he would quit.

10. He has been secretive about ROW positions becoming available for promotion until his "favorites" are appointed.

B. Arnold Tornell

1. He picked up his personal mail in a state car during working hours and charged this time to projects.

2. He constantly charged 8 hours per day on his timesheet but only worked 7 1/2 hours per day.

3. He is receiving retirement benefits greater than he is entitled to because of the additional base pay received as a result of (2) above.

c. Pamela Lewis

1. She falsified her PDQ to get her present position (range 18).

2. She used a state car to hunt for a house for Harold Cameron when he was moving from Juneau to Fairbanks and charged this time to projects.

D. Dan Baum

1. He used state car to hunt for a house for Harold Cameron and then charged the time to projects.

2. He cut Harold Cameron's lawn while Harold was on vacation and then charged the time to projects.

3. He has attended Borough Platting Board meetings on state time and charged time to projects.

E. Sharon McLeod

1. She (and Dan Baum) approved Arnold Tornell's timesheets.

2. She conspired against Charles Moyer by taking the job which "Chuck" was better qualified for.

F. Jane Brownfield

1. She may have falsified information on her employment application when she returned to employment in the ROW Section about 1-1/2 years ago.

CONCLUSIONS:

A.1. Harold Cameron directed Walt Werner to change the value of his appraisal for the Ebenal parcel on the University Avenue to facilitate negotiation of the parcel.

During an interview, Walt Werner stated that Harold Cameron had directed him to decrease the appraised value of the parcel as it was too high. When Harold Cameron was asked about this parcel he

stated that he did not recall giving Walt Werner any such directive.

A review of the ROW files shows Parcel 7 on A3775 Fairbanks Expressway West as Ebenals but the appraiser was Glen Potts and not Walt Werner. A search of the files failed to produce an appraisal for Ebenals on Parcel 7 RS-M-0617(1) University Avenue South. A call to Juneau Headquarters disclosed there was no appraisal copy there. A call to Fairbanks Attorney General's Office disclosed that although the parcel had been condemned, they had no copy of the parcel appraisal as all their files had been sent to Juneau to Archives.

This parcel is 8 years old, the appraisal was apparently for $9,000-00 (this is the amount deposited with the court) and the final judgement was for an award of $15,000.00, therefore, there appears to be no evidence available which would support the allegation.

A.2. Harold Cameron made Walt Werner change Walt's personnel evaluation of Dan Baum.

Mr. Cameron stated that he has no recollection of ever directing Walt Werner to change a personnel evaluation which Walt had prepared. A review of the personnel file of Dan Baum disclosed that Stan Constantine prepared the first two personnel evaluation reports on Dan Baum in 1974-1975 and all others were prepared by Arnold Tornell.

Therefore, there appears to be no grounds for the above stated allegation.

A.3. He signed Arnold Tornell's timesheets (many times) knowing Arnold had only worked 7-1/2 hours a day rather than the 8 hours a day as reported and approved. See B.2. Comments.

A.4. Harold Cameron permitted Arnold Tornell to use a state car to pick up private mail at the post office on state time. Harold Cameron stated that he had never authorized the use of a state car, during working hours or otherwise, for private use of any sort (see B.1.).

A.5. Harold Cameron attempted to get extra pay for Dan Baum through a retro-promotion.

Mr. Baum has filed a grievance with the State on the above and this is pending in the administrative process to settle employee grievances. The settlement of the grievance should determine if there were any improprieties in Mr. Cameron's actions.

A.6. Harold Cameron discriminated against Charles Moyer when Sharon McLeod was hired as Relocation Supervisor, he discriminated against Steevyn Cysewski when she was passed over twice when two persons from outside the Department were hired, and he discriminated against Burle Beard by not promoting him in 9-1/2 years and not providing cross training so that he could become eligible for a promotion.

a) Charles Moyer stated that he did not feel he was discriminated against. He said he was not on the register and he was not as well qualified as Ms. McLeod.

b) Ms. Cysewski was only on one of the two registers for the positions in question.

c) Burle Beard's personnel record indicates that contrary to what Mr. Beard has indicated in the above allegation, he has received training on at least 15 different times in all facets of ROW operations. Also his last promotion was 8 years ago not 9-1/2 years.

In all cases cited in the allegation, it was found that all personnel hiring regulations were complied with, all registers were worked in the proper manner and the successful candidates were all selected from the top 5 candidates on all registers.

It is to be management's determination as to which candidate is chosen in the highest five candidates on a register which does not have to be the highest scoring candidate.

A.7. Harold Cameron refused appraisal training for Walt Werner and Glen Potts.

Mr. Cameron stated that he probably did refuse training to Walt Werner and Glen Potts as the project priorities and scheduling would dictate who can be spared from project work to attend a training session rather than just the wishes of the employee.

A.8. Harold Cameron signed Pam Lewis's PDQ knowing that the information contained on the PDQ was not true.

There was no indication that Pam Lewis's PDQ contained any untrue statements.

A.9. Harold Cameron put pressure on Richard Kendall to do "a hatchet job" on John Evans so that he would quit.

Interviews with Harold Cameron and all members of the ROW Engineering unit indicated that John Evans was having problems with transposition of numbers and other aspects of the ROW Engineering operation. The interviews indicated that John Evans was experienced in the preparation of aviation design plans but was having difficulty in adapting to the ROW Engineering methods and procedures which was causing problems with project scheduling and engineering production. Finally due to frustration brought on by this condition and Richard Kendall's pressuring him to complete accurate ROW Engineer information caused John Evans to retire about one year prior to his planned retirement.

A.10. Harold Cameron has been secretive about Right of Way positions becoming available for promotion until his "favorites" are appointed.

While it is true, that in a number of cases in hiring or promoting ROW personnel, the position was not common knowledge among all the ROW personnel, it is also each individuals responsibility to make sure their name is on any State registers for positions to which they may aspire.

B.1. Arnold Tornell picked up his personal mail in a state car during working hours and charged this time to projects.

Mr. Tornell stated that he did pick up his personal mail quite often during working hours but in all cases it was while he had some type of business to conduct downtown such as city or borough business, business with the Attorney General's Office, the Recorders Office or one of the downtown banks.

The evidence is somewhat inconclusive and contradictory regarding this allegation, however, as there is a large amount of evidence suggesting this, there may have been a valid problem prior to Mr. Tornell's retirement.

B.2. Arnold Tornell constantly charged 8 hours per day on his timesheet but only worked 7-1/2 hours per day.

Mr. Tornell stated that it was not true that he only worked 7-1/2 hours a day because he had some evening appointments and also some weekend appointments, and overall these would balance out and more than equal the 1/2 hour per day specified in the APEA supervisors contract.

This is consistent with other supervisory personnel in the Department who are performing similar duties. The supervisory contract did not specify when the 1/2 hour was to be worked.

Based on the above and the writers knowledge of other supervisors throughout the Department, there appears to be little basis for the allegation.

B.3. Arnold Tornell is receiving retirement benefits greater than he is entitled to because of the additional base pay received.

If allegation number B.2. against Mr. Tornell is not valid, then there is no validity to this allegation.

C.1. Pamela Lewis falsified her PDQ to get her present position (range 18).

There is no indication that Pamela Lewis falsified her PDQ.

C.2. Pamela Lewis used a state car to hunt for a house for Harold Cameron when he was moving from Juneau to Fairbanks and charged this to projects.

While there were rumors that the above allegation had occurred there was no substantiating evidence to indicate that his allegation was true.

D.1. Dan Baum used a state car to hunt for a house for Harold Cameron and then charged the time to projects.

Mr. Baum stated when interviewed that he had twice driven by a house which was for sale, while he was travelling between his office at Peger Road and the downtown Attorney General's Office. However, this was the extent of his search except for a number of phone calls (most all during lunch hour) to realtors.

There was no evidence found to indicate otherwise.

D.2. Dan Baum cut Harold Cameron's lawn while Harold was on vacation in June, 1984 and then charged the time to Federal and/or State projects.

Mr. Baum state that he had cut Harold's lawn for him, but it was in the evening and on Saturday and not during state working hours. There was no evidence found to indicate otherwise.

D.3. Dan Baum attended Borough Platting Board meetings on state time and charged this time to project.

Mr. Baum was appointed to the Platting Board on the recommendation of several DOT&PF personnel. It was perceived by Mr. Baum; Arnold Tornell, his supervisor; and Harold Cameron, Chief ROW Agent for Northern Region that the appointment to the Platting Board was of benefit to the state and Department and the time served during working hours would be part of normal work duties. Mr. Baum's time was charged to the project which he worked on the day of the Platting Board meeting. Over the 10 month period up until April, 1985 Mr. Baum was on the Platting Board, meeting two Wednesdays per month at 3:00 pm. However, the workload in the ROW Section became such that Mr. Baum was not able to leave work for the meeting until after state quiting time.

Mr. Baum's time which had been charged to projects rather than overhead is as follows:

State Maintenance Projects	1.5 hrs.	$ 60.12
* Alaska Highway Mile 1270-1285	3.0 hrs.	120.24
* Delta Erosion Control	1.5 hrs.	60.12
* Alaska Highway Mile 1256-1270	6.0 hrs.	240.48
Healy-Otto Lake Access Road	1.5 hrs.	60.12
*South Fairbanks Expressway - East	7.5 hrs.	300.60
Total	21.0 hrs.	$841.68

*Indicates Federal-Aid projects.

E.I. Sharon McLeod (and Dan Baum) approved Arnold Tornell's timesheets (which reported 8 hours and not 7-1/2 hours).

The State Administrative Manual does not address the authority for timesheet approval as timesheets are a Department function. The only requirement found for DOT&PF was that there was a signature in the supervisor line. This then means that it is not who signs or that they are certifying the timesheet information. Therefore, under current Policy and practice, the person signing the supervisors signature line on the timesheet is not approving but rather is signing so that the timesheet may be processed by the time reporting system.

E.2. Sharon McLeod conspired against Charles Moyer by taking the job which "Chuck" was better-qualified for.

See response to allegation A.6.

F.1. Jane Brownfield may have falsified information on her employment application when

she returned to employment in the ROW Section about 1-1/2 years ago.

The evidence would not support this allegation.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

BURLE B. BEARD, Appellant, v. DAN BAUM, HAROLD A. CAMERON, SHARON McLEOD, WILLIAM B. McMULLEN, STEPHEN C. SISK, and CAROLINE C. VENUSTI individually and as employees of the STATE OF ALASKA; and THE STATE OF ALASKA, Appellees.	)

Superior Court No. 4FA-87-369 Civil
Supreme Court No. S-3229

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
JAY HODGES, JUDGE

BRIEF OF APPELLEE

DOUGLAS B. BAILY
ATTORNEY GENERAL

By:

/s/
Raymond Funk
Assistant Attorney General
100 Cushman St., Ste. 400
Fairbanks, AK 99701
(907) 452-1568
Attorney for State of Alaska
Appellees

Filed June 22, 1989, in the

Supreme Court of the State
of Alaska
David A. Lampen, Clerk

By: /s/
Deputy Clerk

Ex. 1

II. The superior court correctly granted summary judgment as to the Section 1983 constitutional claims and did not err in finding the state cannot be sued.

Beard asserts that the superior court erred in ruling that the state and its employees acting in their official capacities are not "persons." [At. Br. 42-43] Beard is referring to the superior court's grant of summary judgment to defendants as to count IX of the amended complaint. [R. 576-77]

The superior court held that the state and individual state employee defendants are immune from suit on alleged violations of 42 U.S.C. § 1983 under Vest v. Schafer, 757 P.2d 588 (Alaska 1988).

Beard offers no argument to the contrary, merely noting that the issue is before the U.S. Supreme Court in a Michigan case. [At. Br. 42-43] That case has just been decided, and holds that states and state officials sued in their official capacities are not "persons"

under 42 U.S.C. § 1983. Will v. Michigan Dep't of State Police, ___ U.S.L.W. ____ (June 15, 1989).

III. The superior court did not err in finding that individual defendants were protected in their individual capacity from section 1983 claims.

The superior court then went on to consider the question of whether the state employee defendants could be sued in their individual capacities or were protected under qualified or good faith immunity. This question was considered in light of Beard's claims that his disruptive activities were protected speech with the court concluding they were not. The superior held:

> It is clear that under the facts of this case, Beard's public comments are not protected to the extent that qualified immunity does not apply. Prior to Beard's statements, a full investigation had been done; his actions were disruptive to his working relationship with fellow employees. Defendants' conduct in ordering Beard to refrain from further statements, when viewed objectively, was reasonable. [State v. Haley, 687 P.2d 305 (Alaska 1988)]

> Even if there is no qualified immunity, Beard's actions are not constitutionally protected. Beard's statements do not address a legitimate issue of public concern. The State thoroughly investigated Beard's allegations. They gave him a complete report of the investigation. Each of Beard's specific allegations were addressed, explaining the conclusions and setting forth remedial measures where applicable. In spite of this investigation, Beard continued to focus on the alleged fraud. The State told Beard that unless he could present new allegations or new evidence he should stop discussing the allegations on work time. In light of the evidence of disruption in the work place, this directive to Beard seems reasonable. In this factual context, Beard's speech was not protected.

[R. 577-78]

Beard claims on appeal that Beard's speech was so protected as to defeat the qualified immunity available to state officials. The claim by Beard is that his constructive discharge violated his First Amendment free speech right and that thus the defendants are liable for breach of his civil rights.

The primary Alaskan case on this issue is Wickwire v. State, 725 P.2d 695 (Alaska 1986).

In Wickwire, this court adopted the balancing test enunciated by the U.S. Supreme Court in Pickering v. Board of Education, 391 US 563, 20 L.Ed.2d 811, 88 S. Ct. 1731 (1968). It balances the government employer's interest in promoting efficiency in its operation with the employee's interest in commenting on matters of public concern.

> In balancing these interests, seven factors are considered, including whether the speech has an impact on the government's operation and on the employee's daily job performance, and whether the speech addresses an issue of legitimate public concern. The latter factor is a threshold requirement. If an employee's speech does not relate to a "matter of political, social or other concern to the community," the court need not scrutinize the reason for the discharge.

725 P.2d at 700. The trial court never got any further in its analysis than finding that Beard's allegations did not rise to the level of public concern.

First, Wickwire is not directly applicable because Beard was not fired like Wickwire. Thus, the court can't look to the written explanations given by the supervisor as to the reason for firing. Beard quit

partially in response to the stress he felt at the job and in accordance with medical advice. [R. 215] However, there is no doubt that Beard's supervisors by mid-1986 felt that Beard's refusal to leave the matter of his allegations against his supervisor and follow employees alone was disruptive of the work situation in the Right-of-Way office. [R. 145] It was exactly these disruptive activities at the work place that caused DOT to be concerned that work wasn't getting done. By that point, the issues were not, as Beard contends, matters of public concern--they had been investigated and, except in a few particulars, all fellow employees accused by Beard of misconduct had been exonerated. Because he was basically accusing six of his co-workers of being criminals, it is not hard to see why these accusations were seen as disruptive. Beard was repeatedly told to keep his accusations to himself in the workplace, absent any new evidence. [R. 62-75] He could not do this and got repeated warnings from his supervisors to stop. [R. 17, 145] The court properly held that this did not rise to the level of matters of public concern.

IN THE SUPREME COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,)
Appellant,)
v.)
DAN BAUM, HAROLD A. CAMERON,)
SHARON McLEOD, WILLIAM B.)
McMULLEN, STEPHEN C. SISK,)
and CAROLINE C. VENUSTI)
individually and as employees)
of the STATE OF ALASKA; and)
THE STATE OF ALASKA,)
Appellees.)
)

Supreme Court No. S-3229

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT
JAY HODGES, JUDGE

REPLY BRIEF OF APPELLANT

LAW OFFICE OF THOMAS R. WICKWIRE
3700 University Avenue South
Fairbanks, Alaska 99709
474-0068
Attorney for Appellant
/s/
THOMAS R. WICKWIRE

FILED in the Supreme Court
of the State of Alaska,
this 7th day of August, 1989.

CLERK OF THE COURT

By: /s/
Deputy Clerk

Ex. 2

It stretches "everyone is presumed to know the law" too far.

The Superior Court should have allowed Beard a fair chance to reach the merits of his intentional infliction of emotional distress and wrongful constructive termination claims. Its dismissal was not on the merits, so he has never had one due process hearing on these claims, though he tried diligently with both APEA and the Court.

II. The Section 1983 Claims

Beard concedes the State and its officials acting in their official capacities are immune from suit for 42 U.S.C. Section 1983 violations because they are not "persons."

CONCLUSION

> But you have neglected the more important matters of the law--justice, mercy and faithfulness. . . . You strain out a gnat but swallow a camel. Matthew 23:23-24 (NIV)

Kenneth Culp Davis wrote Discretionary Justice in 1969 (University of Illinois Press 1971). With the theme that there is a need to replace broad discretion which the courts have in some areas with more rules so more cases are decided on their merits and with better

consistency. He specifically criticized the procedural defenses available to the government when defending civil cases as not worth their cost in money and injustice caused when the merits of a case are never reached. Professor Davis wrote:

> The intricacies of the technical remedies have grown. the need for litigating them

The law already recognizes the employee's property and liberty interests and the State's pay and promotion by merit, not by politics or favoritism, interests in public employment. The taxpayers and those affected by the efficiency and effectiveness of D.O.T. have an interest against funding the year or so long effort required to make a paper trail of progressive discipline. During this time the supervisor's interest is furthered if he can induce the target employee to make mistakes which can be used use in poor evaluations. The aw encourages clever manipulation of the system if it can close off an inquiry into the truth behind the accusations.

For these reasons, the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional

infliction of emotional distress, wrongful constructive termination and defamation.

Respectfully submitted,
/s/
Thomas P. Wickwire
Attorney for Appellant

CERTIFICATE OF SERVICE
The undersigned hereby certifies that on the 7th day of August 1989, a true and correct copy of the foregoing was served by mail on: R. Funk; C. Riley

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

BURLE B. BEARD,)
Plaintiff(s),)
v.)
DAN BAUM, et al.,)
Defendant(s).)
)

No. 4FA-87-369 Civil

SPECIAL VERDICT

We the Jury in the above-entitled case find by agreement of ten (10) or more of our members, the following on questions submitted to us.

Q. 1. Did Mr. Beard's supervisors and other Department of Transportation employees acting together or separately make Mr. Beard's job intolerable?

Yes (answer yes or no)

Q. 2. Did Mr. Beard resign because his job had become intolerable by reason of the acts of his supervisors and other employees?

Yes (answer yes or no)

If your answer is "yes" to both question 1 and 2, answer question 3. If your answer is

"no" to either question 1 or 2, skip question 3 and go to question 4.

Ex. 3

Q. 3. After subtracting any sums which should be deducted according to the instructions I gave you, what is the total amount of earnings and benefits lost by Mr. Beard as a result of the breach of his contract?

$ 696,571.00

Q. 4. Did any of the individual defendant intentionally inflict emotional distress on Mr. Beard?

Yes (answer yes or no)

If your answer to question 4 is yes, answer question 5. If your answer to question 4 is "no" skip question 5 and go to question 6.

Q. 5. What amount of money will fairly compensate Mr. Beard for intentional infliction of emotional harm by each of the following defendants. (It need not, but may, be all of them.)

William McMullen	$1000.00
Harold Cameron	$1000.00
Sharon McLeod	$ -0-

Daniel Baum $ -0-

Caroline Venusti $1000.00

Q. 6. Did any of the individual defendants, while exercising the power or authority of their office, retaliate against Mr. Beard by causing harm to him for reporting or speaking out on possible

Wrongdoing by his co-workers or supervisors as set forth in Instructions 24, 25?

Yes (answer yes or no)

If your answer to question 6 is "yes" answer question 7. If your answer to question 6 is "no" skip question 7 and go to question 8.

Q. 7. What amount of money will fairly compensate Mr. Beard, for retaliation against him for speaking out on free speech issues, by the following individual defendants? (It need not, but may be all of them.)

William McMullen $ -0-

Harold Cameron $ -0-

Sharon McLeod $ -0-

Daniel Baum $ -0-

Caroline Venusti $ -0-

Q. 8. Do you find that either one or more of the individual defendants' actions was the type of wrongdoing as to warrant an award of money damages solely to punish them?

Yes (answer yes or no)

If so, what amount for each individual defendant?

William McMullen	$70,000.00
Harold Cameron	$45,000.00
Sharon McLeod	$1,000.00
Daniel Baum	$ -0-
Caroline Venusti	$45,000.00

DATED at Fairbanks, Alaska this 29th day of July, 1991.

/s/
Rene Moore, Foreperson

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN,	)
Appellants,	)
v.	)
BURLE B. BEARD,	) Appellate Court No. S-6387
Appellee.	) Trial Court No. 4FA-87-369

RESPONSE TO PETITION FOR REHEARING

Beard's Petition for Rehearing claims that the court has overlooked a controlling legal principle: exhaustion of administrative remedies is not a prerequisite to bringing a civil rights claim. He then asks the court to merge the IIED verdict with his civil rights verdict. The Appellants Venusti and McMullen oppose the granting of rehearing.

I. The argument was not raised in *Beard III* or *Beard II*, and was explicitly waived in *Beard I*

Beard acknowledges that he did not list the principle as a point on appeal and did not brief the issue in either *Leard II* or *Beard III*. (Petition for Rehearing at 2, n.1) However, he seeks to excuse his failure to raise and argue what he terms a "controlling

issue of law" by showing that he at least raised the issue in his 1989 *Beard I* brief. (*Id.*) It is more correct to say that he *raised* and then specifically *waived* the argument in *Beard I*.

The state and its employees argued in their brief in *Beard I* that the state and state officials were not subject to suit under 42 U.S.C. § 1983. (Ex. 1) Beard's Reply Brief specifically conceded the point in a one-sentence reply and did not even discuss the individual capacities of the employees. (Ex. 2 at 11) Because his suit only involved actions taken by Venusti or McMullen in their official capacities, his abandonment of any constitutional claims was underscored in the summary of his request for relief:

> For these reasons the summary judgment should be reversed and the case remanded for trial on Beard's claims of intentional infliction of emotional distress, wrongful constructive termination and defamation. (Ex. 2 at 14)

The present petition for rehearing is based on a principle that was explicitly waived in earlier proceedings, and subsequently waived

by not being raised at repeated opportunities to do so.

II. The parameters of the "controlling principle" are not so well set that the issue is plain error

Because Beard did not raise the argument in *Beard III* or *Beard II*, and waived it in *Beard I*, his petition for rehearing concludes with the request that the court consider whether its failure to *sua sponte* invoke *Patsy* is plain error.[9] (Petition at 5)

Patsy v. Board of Regents, 457 U.S. 496, 102 S.Ct. 2557 (1982) was an employment case involving race-based discrimination. The court held, based on the historical suspicion of state hostility to enforcement of federal civil rights, that the exhaustion of *state* remedies was not be required as a condition to bringing a civil rights action in *federal* court.

In 1988 the United States Supreme Court considered the unprovoked beating of a black

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[9]The state's attorney in *Beard II* and *Beard III* was not involved in the briefing in *Beard I*, and just like Beard's counsel, the trial court, and the Supreme Court, did not see the issue now claimed to be plain error on rehearing. The state's attorney did not violate any ethical standards.

man by white police officers, and the victim's failure to comply with a state administrative claims procedure. The court held that for that claim the failure to exhaust state administrative remedies would not be a bar to bringing a civil rights claim in a state court. *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302 (1988).

Subsequent to *Felder*, the Alaska Supreme Court issued opinions in 1988 and 1990 in cases raising constitutional claims but <u>not</u> based on race and held the constitutional claims were subject to review by available administrative remedies. *Kollodge v. State*, 757 P.2d 1028, 1033(Alaska 1988) n.4; *Ben Lomond, Inc. V. Anchorage*, 761 P.2d 119, 122 (Alaska 1988) (Compton, J.); *Beard v. Baum*, 796 P.2d 1344 (Alaska 1990) (*Beard I*). In *Ben Lomand* the court cited Professor Davis to support its holding that:

> We believe that requiring exhaustion is particularly appropriate where a complainant raises both constitutional and non-constitutional issues. . . . [S]uccessful pursuit of a claim through the administrative process could obviate the need for judicial review of the constitutional issues.

761 P.2d at 122.

After *Beard I* established the law of the case for the present controversy, the court issued *Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991). *Diedrich* did not involve claims of free speech or any disciplinary action, but alleged violation of due process in his city employment termination. *Diedrich*, 805 P.2d at 364-5. Relying on *Patsy* and *Felder*, the court held that federal law permitted the filing of a § 1983 suit without exhaustion of administrative remedies. *Id.* at 368.

Since *Diedrich*, the United States Supreme Court clarified that the government employer must have latitude to suppress employee speech and must be permitted to utilize administrative review processes which do not afford the same procedural rules available in judicial forums so long as the procedures are reasonable. *Waters v. Churchill*, 511 U.S. 661, 667-669, 114 S.Ct. 1878, 1888-1889 (1994). The court declared that "Even if [the subject speech] was speech on a matter of public concern...the potential disruptiveness of the speech as reported was enough to outweigh

whatever First Amendment value it may have had." *Id.* at 667-668, 1890.

After *Diedrich* the Alaska Supreme Court issued two opinions which recognized that in government employment cases involving disruptive speech but not racial discrimination that exhaustion of administrative remedies was required even when constitutional claims are made. The first was *Cameron v. Beard*, 864 P.2d 538 (Alaska 1993) (*Beard II*), which held that supervisory conduct limiting employee speech is a matter that must be resolved through the union grievance process. Following *Waters* the court considered *Voigt v. Snowden*, 923 P.2d 778, 781 (Alaska 1996), which also did not involve allegations of racial discrimination but which presented constitutional claims. The court affirmed the dismissal of the complaint for the failure to exhaust administrative remedies. It found significant that a comprehensive grievance process was provided as part of the employment contract. *Id.* at 781, n.3.

For Beard to show plain error in *Beard III* in 1997 he must also conclude that the court committed plain error in *Ben Lomond* in

1988, *Kollodge* in 1988, *Beard II* in 1993 and *Voigt* in 1996. The "controlling rule of law" claimed in Beard's petition actually appears contrary to his cause. The actual rule appears to be that a state government employee, without claims of race-based discrimination and with an available grievance process, may not circumvent the grievance process by simply claiming official discipline is a violation of his free speech. The "controlling legal principle" at a minimum is not so clear or controlling or certain that it can be said the court committed plain error by failing to raise the issue *sua sponte*.

III. Merging IIED and Civil Right verdicts

Beard, in his request to merge two verdicts, does not allege error below or plain error on appeal, but asks the court to create a remedy which he never earlier sought. The failure to merge was not only <u>not</u> plain error, but there is absolutely no authority for the court to rewrite the verdict. Beard's request, never before raised at any level, without any authority, and without any identification of overlooked legal principle, must be denied.

The jury awarded no damages for Beard's free speech claim, not even nominal damages.

(Ex. 3) Beard did not appeal that finding in *Beard II*. He had not asked the trial court to have the jury distinguish between IIED punitive damages and free speech punitive damages in the verdict, even though the defendants had been promised a hearing on exhaustion. If he wanted to protect any civil rights verdict from merging with the common law tort claims he had an opportunity to do so. The failure to distinguish between the claims was not plain error. If his petition as to exhaustion is granted and then a decision is made that he was excused as to his § 1983 claim, (and if other issues, below, are resolved in his favor) the result must be limited to the reinstatement of the zero verdicts and then possibly to remand for a trial on punitive damages. To do anything else would be to re-write the verdict.

Upon remand of *Beard I*, Beard focused on the exhaustion facts and made strategic decisions that he now wishes to undo. There has been no citation to overlooked law or facts. Given the jury verdict of no damages, denying the petition for rehearing will not work an injustice. There has been no identification of overlooked legal principles

or argument. The petition to merge on rehearing must be denied.

IV. Other issues

If the free speech cause of action is reinstated then Venusti and McMullen ask that the court then consider their other appeal points which were not reached by the current decision. Their Civil Rule 60(b) claim is especially compelling in light of how the trial was tainted by litigation of all the other unauthorized constructive discharge and IIED claims.

V. Conclusion

The matter raised in the petition was explicitly waived in *Beard I*, and then was neither preserved nor briefed at multiple opportunities thereafter. There was no plain error. The petition for rehearing should be denied.

Dated: January 29, 1998

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: /s/
Randy M. Olsen
Assistant Attorney General
ABA # 7710147

This is to certify that on the 29 day of January 1998 a copy of the foregoing is being mailed to the following attorneys or parties of record:

Thomas Wickwire, 3730 University Ave. So.
Fairbanks, AK 99709

/s/
Judith A. Smith

CERTIFICATE OF COMPLIANCE

Pursuant to Alaska R. App. P. 513.5, I certify that the preceding document is printed in 13 point Times New Roman.

Judith A. Smith

IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, CAROLINE VENUSTI and WILLIAM McMULLEN,

Appellants and Cross-Appellees,

v.

BURLE B. BEARD,

Appellee and Cross-Appellant.

Superior Court No. 4FA-87-369 CI
Supreme Court Case Nos. S-6378/6438

PETITION FOR REHEARING

Appellee Beard petitions for rehearing on the ground that the Court has overlooked a directly controlling decision, Patsy v. Board of Regents, 457 U.S. 496, 73 L.Ed.2d 172 (1982), Appellate Rule 506(a)(1), or overlooked a material proposition of law, Appellate Rule 506(a)(2): federal law governs and limits the state defenses to 42 U.S.C. § 1983 claims.

I. The 42 U.S.C. § 1983 claims were not subject to state exhaustion requirements.

Section 1983 plaintiffs are not required to exhaust administrative remedies. Patsy v. Board of Regents, 457 U.S. 496, 73 L.Ed.2d 172 (1982), followed in Alaska in State, Dept. of Health & Soc. Services v. ASHNHA, 856 P.2d 755, 758 (Alaska 1993), and Diedrich v. City of Ketchikan, 805 P.2d 362 (Alaska 1991). In

Diedrich, this Court quoted from Felder v. Casey, 487 U.S. 131, 101 L.Ed.2d 123 (1988), that states are not permitted to place conditions on the vindication of a federal right, 805 P.2d at 368. This Court also stated, id. at 369, note 13,

"Felder appears to have settled this issue conclusively."[10]

In their treatise, Schwartz and Kirklin collect the reasons why Congress never intended for § 1983 actions to be subject to state administrative exhaustion requirements. One reason was Congress' mistrust for the fact

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[10]Beard cited Patsy in his opening brief, p. 31, in Beard I for this point. The Court ruled in favor of Beard on the alternative futility issue and adhered to that holding until its decision of Beard II. Beard did not cite Patsy in his Beard II brief because there he took the position that Beard I had resolved the exhaustion issue in his favor. From the Beard II decision to the end of the remand proceedings in Superior Court, Beard and the Superior Court followed the remand instructions, held the evidentiary hearing and got a decision that Beard prevailed on the facts at issue.

When Defendants appealed that decision, Beard did not cite Patsy again, as an alternative ground for affirming. In hindsight, that oversight is quite apparent. Counsel apologizes for his part in causing the Court to miss this proposition.

finding processes of state institutions and its belief that the federal courts would be less susceptible to local prejudice and to the existing defects in the fact finding processes of the state courts.[11] Beard's claims, having been proven to a jury, are better examples of this than most cases cited for this, which involve yet to be proven claims.

The rule that § 1983 claimants are not subject to state exhaustion requirements is long standing, consistently applied and subject only to well settled exceptions.

The other recognized treatise on § 1983, Nahmod,[12] states that the Supreme Court has consistently followed the no-exhaustion of state administrative remedies rule since 1974,[13] before pronouncing the rule in unequivocal terms in Patsy (1982).

Counsel has not found a case directly on point, but it appears the point is clearly

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[11]Schwartz & Kirklin, Section 1983 Litigation. Claims and Defenses, § 10.3, p. 560 (3d ed.)

[12]Nahmod, Civil Rights and Civil Liberties Litigation, The Law of Section 1983 (3d ed.) § 9.12.

[13]Steffel v. Thompson, 415 U.S. 452, 472-73 (1974).

established and has supremacy so as to be p, particularly if a state court applied state administrative exhaustion requirements to vacate a § 1983 judgment that had been reviewed on appeal and found otherwise error free. Brown v. Western Railway, 338 U.S. 294 (1949), and Felder v. Casey, id., appear to indicate that state pleading rules cannot be applied to preclude a § 1983 claim if the claim would not be subject to such a rule in federal court.[14]

Note 6 of the majority opinion in this case, Slip Opinion at 18, distinguishes claims against the State from claims against individual defendants for the purpose of deciding whether all were covered by the grievance procedure. However, the opinion does not address which claims are § 1983 claims and which are state law only claims. This distinction becomes important only with the new decision because, during the time that futility was established, failure to exhaust was not a bar to either state law or § 1983 claims. The briefs in Beard III did not

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[14]1 Nahmod, § 1.14, p. 53-54.

separate the § 1983 claims from the state law claims.[15]

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[15]Beard's attorney fee motion memorandum was reviewed for this point. The distinction was not important there because the attorney fees under 42 U.S.C. § 1988 or Civil Rule 82 were nearly identical in amount.

Defendants may fault Beard's counsel for failing to raise this point below. But, Beard prevailed below on the futility issue, so did not challenge it on other grounds or argue with the Superior Court on whether it should consider it at all. Beard would have been stretching the limits of advocacy to urge the Superior Court to disobey the remand instructions and not conduct the review hearing because of Patsy or any other authorities. Beard had a duty to follow the remand instructions.[16]

II. The IIED claims are § 1983 claims

Prior to trial, the parties disputed whether Beard must prove that the employer's motive for creating the constructive discharge

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[16]Defendants, if aware of these cases, had a duty to bring Patsy or Felder v. Casey, or either of the Alaska cases which cited them, to the Court's attention. Rules of Professional Conduct 3.3 provides:

> **Candor Toward the Tribunal**
> (a) A lawyer shall not knowingly:
> . . . .
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

environment was to deny Beard his Free Speech rights. Beard contended proof of motive was not part of his burden, even though all the evidence pointed toward intent to retaliate for his Free speech. Proving this intent was unimportant because individuals and municipalities, but not states, can be liable for § 1983 claims.

This Court agreed that beard has no such burden to prove the employer's specific intent. Beard II, 864 P.2d at 547. The jury was not asked to decide whether any of Beard's proven
claims were motivated by something other than retaliation for speaking out on protected Free Speech issues, which they found. Also, it is apparent from this Court's review of the facts in Beard II, 864 P.2d at 548, that there was no evidence of any other motive for either he constructive termination acts or the IIED acts. Defendants merely contended they did not do it.

After finding constructive termination, the jury found the defendants liable for emotional distress (Verdict, Q.5), then found that they harmed Beard by use of state power for his speaking out on possible wrongdoing by

co-workers or supervisors (Verdict, Q.6) and that four of the five individual defendants' wrongdoing was sufficiently egregious to warrant punitive damages. These answers show the jury found that the IIED acts were done as retaliation for Beard's Free Speech complaints. The Defendants contended that the defendants did not do the tortious acts, not that there was a non-§ 1983 motive for them, so once proven, they establish § 1983 claims.

Beard requests the Court to grant rehearing and modify its decision to follow Patsy, Felder and Diedrich and hold that Beard was not required to exhaust administrative remedies for his IIED claims because they were 42 U.S.C. § 1983 claims, as they were motivated by Defendants' retaliation for Beard's Free Speech whistleblowing. They were pleaded as such, instructed to and found by the jury as such. Beard asks the Court to consider whether its failure to address the Patsy and Felder rules was plain error and to correct it.

DATED: 2 December 1997

/s/
Thomas R. Wickwire
Attorney for Burle B. Beard
ABA #7111049

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, et al., Petitioner,	)	
v.	)	Supreme Court - S-06378
BURLE B. BEARD, Respondent.	)	**ORDER** Petition for Rehearing
Trial Court Case #4FA-87-00369 CI	)	Date of Order: 5/29/98

Before: Matthews, Chief Justice, Compton, Eastaugh, Justices, and Rabinowitz, Senior Justice[*] [Fabe and Bryner, Justices, not participating.]

On consideration of the Petition for Rehearing filed on **December 2, 1997**, and the response filed on **January 29, 1998**.

IT IS ORDERED:

1. The Petition for Rehearing is **DENIED** because Beard is deemed to have waived the argument, raised for the first time in his petition, that the exhaustion doctrine cannot bar a claim under 42 U.S.C. § 1983.

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[*]Sitting by assignment under article IV, section 11, of the Alaska Constitution and Alaska Administrative Rule 23(a).

2. Opinion No. 4913, issued on November 28, 1997, is **WITHDRAWN** and Opinion No. 4996 is issued in its place on today. Part III.A.4 contains changes. The opinion is otherwise unchanged

Entered by the direction of the court.

Clerk of the Appellate Courts

/s/
Cheryl Jones, Deputy Clerk

COMPTON, Justice dissents. He would grant the petition.